No. 11-9259

In the Supreme Court of the United States

RONALD CARL ROSE, PETITIONER

v.

STATE OF MICHIGAN

ON PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Michigan Court of Appeals properly applied this Court's precedents and upheld the trial court's use of a one-way screen during testimony of an 8-year-old rape victim.

PARTIES TO THE PROCEEDING

There are no parties to the proceeding other than those listed in the caption. Petitioner is Ronald Carl Rose, a convicted sex offender. Respondent, the State of Michigan, prosecuted and now incarcerates Mr. Rose.

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The Michigan Supreme Court's order vacating its prior grant of Petitioner's application for leave to appeal, Pet. App. 20a–26a, is reported at 805 N.W.2d 827. The Michigan Supreme Court's initial grant of Petitioner's application for leave to appeal, Pet. App. 19a, is reported at 793 N.W.2d 235. The opinion of the Michigan Court of Appeals, Pet. App. 1a–18a, is reported at 808 N.W.2d 301.

JURISDICTION

The Michigan Supreme Court vacated its grant of Petitioner's application for leave to appeal on December 9, 2011. This Court has jurisdiction under 28 U.S.C. § 1257(a)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

The Revised Judicature Act of 1961, Mich. Comp. Laws § 600.2163a, provides in relevant part:

> (15) If upon the motion of a party made before trial the court finds on the record that the special arrangements specified in

subsection (16) are necessary to protect the welfare of the witness, the court shall order those special arrangements. In determining whether it is necessary to protect the welfare of the witness, the court shall consider all of the following:

(a) The age of the witness.

(b) The nature of the offense or offenses.

(c) The desire of the witness or the witness's family or guardian to have the testimony taken in a room closed to the public.

(16) If the court determines on the record that it is necessary to protect the welfare of the witness and grants the motion made under subsection (15), the court shall order 1 or more of the following:

(a) All persons not necessary to the proceeding shall be excluded during the witness's testimony from the courtroom where the trial is held. The witness's testimony shall be broadcast by closed-circuit television to the public in another location out of sight of the witness.

(b) In order to protect the witness from directly viewing the defendant, the courtroom shall be arranged so that the defendant is seated as far from the witness stand as is reasonable and not directly in front of the witness stand. The defendant's position shall be the same for all witnesses and shall be located so as to allow the defendant to hear and see all witnesses and be able to communicate with his or her attorney.

(c) A questioner's stand or podium shall be used for all questioning of all witnesses by all parties and shall be located in front of the witness stand.

INTRODUCTION

Petitioner Ronald Carl Rose raped his sister-in-law, J.B., when she was only eight years old, and exposed J.B. and her ten-year old brother to sexually obscene materials. Before trial, J.B.'s therapist testified to J.B.'s trauma-related symptoms resulting from the rape, including (1) nightmares, (2) bed wetting, (3) difficulty concentrating, and (4) anger outbursts. J.B. was fearful of testifying in court and seeing Rose, and she said she would not be able to do it. The therapist opined that testifying face-to-face to Rose would cause J.B. additional trauma, including numbing, shutting down, and being unable to speak. Further, the fear J.B. felt for Rose would cause her difficulty remembering and expressing memories. The therapist concluded that J.B. would regress in her ongoing therapy after the rapes. Accordingly, the Michigan trial court allowed J.B. to testify about the rape at trial from behind a one-way screen that allowed everyone in the courtroom to see her, including Rose, counsel, the jury, the judge, and the gallery. The screen's only effect was to block J.B.'s view of Rose.

Rose's petition professes the existence of a "deep" conflict between the states on whether the use of a witness screen violates the Sixth Amendment right to confrontation and the due process right to the presumption of innocence. The petition fails to deliver. Rose cites no case from the states or the Circuits where a court has failed to recognize and apply *Maryland* v. *Craig*. Further, Rose's claim that *Crawford* v. *Washington* and *United States* v. *Gonzalez-Lopez* "cast grave doubt on the continued validity of *Craig*" is not supported by a single case. Those

precedents dealt with issues distinct from *Craig*. And here, the Michigan Court of Appeals applied *Craig* correctly.

Regarding the alleged split on Rose's presumption of innocence claim, the petition musters a single case premised on different facts, i.e., essentially an office partition that functioned as a *two*-way barrier that prevented the defendant from observing the witness. The difference between that case and the one here does not even demonstrate a conflict, much less an issue plaguing the courts.

This Court should summarily deny the petition.

STATEMENT OF THE CASE

A. Rose's rape of J.B. and his victimization of J.B.'s brother, R.B.

On April 24, 2008, an Allegan County Circuit Court jury found Petitioner Ronald Rose guilty of four counts of criminal sexual conduct ("CSC") in the first degree and two counts of distributing obscene matter to a child. Trial Transcript ("TT"), vol. III, 142. The trial court sentenced Rose to 25 years' imprisonment for the CSC convictions and 16 months' imprisonment for the distribution convictions, to be served concurrently. Sentencing Transcript 7–9. Rose's convictions stemmed from raping his then-seven-year-old sister-in-law, J.B., and exposing both J.B. and her brother, R.B., to sexually obscene magazines and videos.

Eight-year-old J.B. was home watching t.v. with her parents on June 30, 2007, when she started crying and asked what happens to children when they die. TT, vol. II, 50–51, 104–05. J.B.'s parents were unable to console her as she

continued to cry for 15 minutes, so her mother, Sandra, took her into a bedroom to speak privately with her and to get ready for bed. TT, vol. II, 105–06. There, J.B. told her mother that her brother-in-law, Rose, had been touching her and showing her "bad magazines" and "bad videos." TT, vol. II, 107–08.

When Sandra asked J.B. where Rose touched her, J.B. pointed to the front, lower part of her body and put her hands on her chest. TT, vol. II, 107. J.B. revealed that Rose touched her brother as well. TT, vol. II, 107–08. She then dove under some blankets on the bed and begged Sandra not to tell her father, "[b]ecause at this point in time she just really thought that she was in big trouble." TT, vol. II, 107–08. J.B.'s parents reassured her she did nothing wrong. TT, vol. II, 108.

J.B.'s father, Thomas, called a family friend in the Michigan State Police, who came to their house shortly thereafter. TT, vol. II, 108–09. Trooper Dan Diekema responded and advised Sandra and Thomas not to take any action that night. He told them to just help J.B. relax, to "let her get back to feeling safe." TT, vol. II, 109. He would call them to let them know what the next steps were. TT, vol. II, 109.

According to Trooper Diekema, the protocol for cases of sexual abuse of victims who are younger than 12 or 13 years of age is to interview them as infrequently as possible due to the victim's difficulty with the conversation.[1] TT, vol.

[1] In fact, J.B. testified that she "got a little nervous" about disclosing the abuse to her parents, but she "tried to explain it 'cause I just didn't like it." TT, vol. II, 76. She said she "was nervous about telling my mom 'cause I don't like to explain stuff like that." TT, vol. II, 77.

II, 147. Consequently, forensic interviewers at Safe Harbor typically conduct the victim's forensic interview, as they did in this case. TT, vol. II, 147–48.

In J.B.'s words, Rose "put his private by mine;" that is, "[h]e tried to put it in." TT, vol. II, 53–54. This happened on multiple occasions. TT, vol. II, 55. J.B. described Rose's private as "underneath, like under his—like in front," and said that "pee" comes out of Rose's private. TT, vol. II, 53. Rose violated J.B. in both "[t]he back and the front." TT, vol. II, 53. J.B. described this as, "the butt is in the back and the front private is in the front." TT, vol. II, 54. Rose's violations hurt her, and she told Rose so several times. TT, vol. II, 54.

The rapes occurred in the back bedroom and living room of Rose's house. "Sometimes [J.B.'s sister] was [home] and sometimes she wasn't." And sometimes J.B.'s sister was in the same room when Rose abused J.B., but J.B.'s sister did not see. TT, vol. II, 52.

In the bedroom, Rose had J.B. remove all of her clothes. TT, vol. II, 56. Rose then penetrated J.B. while laying sideways. TT, vol. II, 54–55. J.B. saw "[w]hite stuff" come out of Rose's front private, and it went on J.B.'s leg and the bed. TT, vol. II, 55. Rose "wiped it up with a towel." TT, vol. II, 55. Rose also tried to penetrate J.B.'s anus as she lay on her stomach on the bed. TT, vol. II, 72. "He put it in . . . my bottom, but it didn't go all the way in." TT, vol. II, 73. Specifically, J.B. said that Rose penetrated her "inside where the butt cheeks are." TT, vol. II, 73. J.B. told

Rose that it hurt. TT, vol. II, 73. But Rose did not stop; he continued until he ejaculated. TT, vol. II, 74.

In addition to inserting his penis into J.B.'s vagina and anus, Rose rubbed and attempted to insert his fingers into J.B.'s vagina. TT, vol. II, 59–61. This hurt J.B., and she told him that. TT, vol. II, 61. Rose did this more than once. TT, vol. II, 62. Rose also put his penis in J.B.'s mouth several times. TT, vol. II, 62–63. J.B. was on her knees on the bed and Rose lay on his back. TT, vol. II, 64–65. While Rose had his penis in J.B.'s mouth, he touched "[h]is fingers on his private" and "[m]oved it" around. TT, vol. II, 63.

J.B. described Rose's bedroom. A cheetah-spotted swing hung from the ceiling above the bed. TT, vol. II, 58–59. Both she and Rose used the swing. TT, vol. II, 58–59. In the course of his investigation, Trooper Diekema saw the swing and characterized it as a "sex swing." TT, vol. II, 171.

Rose further sexually abused J.B. on a couch in his living room. TT, vol. II, 56–57. He violated J.B. in the same manner as he had in the bedroom, and again ejaculated. TT, vol. II, 57.

Rose showed J.B. and her ten-year-old brother, R.B., pornography. TT, vol. II, 68, 220, 222. J.B. said that the movies "had girls on it and they had the exact same thing that he did to me." TT, vol. II, 66. The girls and boys in the movies were lying down without any clothes. TT, vol. II, 66, 222. J.B. could hear the movies. TT, vol. II, 67–68. R.B. described some of the movies as having two girls in them and that

the girls "were licking each other" in their "private parts." TT, vol. II, 223–24. When Rose put the movies on, J.B. heard him say "that these movies are about having sex." TT, vol. II, 70. Sometimes Rose played the movies while he abused J.B. in the back bedroom. TT, vol. II, 71. Additionally, R.B. saw Rose masturbate during the movies; that is, Rose "played with his penis [and] . . . [m]oved it up and down and stuff like that."[2] TT, vol. II, 227.

Rose also showed the children pornographic magazines. J.B. described the magazines as having "people in 'em, they had people with no clothes on 'em and they had words in 'em about it and the boys had no clothes on either." TT, vol. II, 67. R.B. said that the magazines "basically were the same thing" as the movies, "except they were just poses." TT, vol. II, 224.

Trooper Diekema seized pornography, both magazines and videos, from Rose's house as evidence. TT, vol. II, 149–50. One video entitled, "Patriot Dames" depicted a naked girl and an American flag on the cover. TT, vol. II, 153–55. R.B. specifically described the cover of one of the movies that Rose showed him as one with an American flag and a naked girl. TT, vol. II, 225. The movies contained "different types of sex scenes; some of women on women, some were 3 women, some were male and female." TT, vol. II, 158. Trooper Diekema seized six magazines that depicted "women and men having sexual relations with no clothes on." TT, vol. II, 159–60, 161.

[2] According to R.B., "[t]here was some times where [Rose's wife—R.B.'s sister] came home and she had opened up the door and Ron had quickly turned everything off, put the CD's away quickly and put his pants back up." TT, vol. II, 230.

J.B. worried that Rose might go to jail if she told anyone. TT, vol. II, 79. And she thought Rose often bought her gifts "so he could probably keep me quiet." TT, vol. II, 80. Moreover, Rose admitted to Trooper Diekema during an interview in the course of the investigation that J.B. "doesn't make up stories, she doesn't lie, [and] she's not one of those kids that blows things out of proportion." TT, vol. II, 168.

After listening to all of the testimony and weighing all of the evidence, the jury convicted Rose of four counts of CSC and two counts of distributing obscene matter to a child. TT, vol. III, 142.

B. Screening J.B. from trauma during her testimony against Rose.

Before trial began, the People filed a motion in the trial court requesting the use of a screen during J.B.'s testimony because J.B. expressed fear of testifying in front of Rose. Pet. App. 31a. (J.B.'s therapist testified to this effect. Pet. App. 32a.) Rose filed a response to the prosecutor's motion.[3]

Jill VanderBent counseled J.B. for several months following Rose's sexual abuse. Pet. App. 32a, 35a. Ms. VanderBent was educated and trained in the identification of traumatic characteristics of children of sexual abuse. Pet. App. 33a. At the time of her testimony, she had worked in that field for approximately 13

[3] Although Rose advanced on appeal and now asserts that the issue of the witness screen turns on federal constitutional law, confrontation and the presumption of innocence were *not* the focus of his written response or his oral argument before the trial court. Rather, Rose argued almost exclusively under state statutory law, specifically Mich. Comp. Laws § 600.2163a, that the screen was not permitted. The term "presumption of innocence" appears only once in his written response, and "confrontation" does not appear at all. During oral argument before the trial court, Rose's counsel mentioned the right to confrontation once, in passing, and only generally referred to prejudice to the defendant. Pet. App. 50a.

years. Pet. App. 33a. The trial court qualified Ms. VanderBent as an expert in the treatment of sexually-abused children. Pet. App. 34a.

J.B. suffered from nightmares, bed wetting, difficulty concentrating, spacing out, zoning out at home and school, and frequent anger outbursts as a result of Rose's sexual abuse. Pet. App. 35a. J.B. told Ms. VanderBent about the abuse in detail and identified Rose as her abuser. Pet. App. 35a–36a. J.B. continually expressed fear of Rose in the course of discussing the abuse. Pet. App. 36a–37a.

Ms. VanderBent also talked to J.B. about testifying in court. Pet. App. 36a. J.B. "indicated that she would be very afraid to come and testify in court and have to see the defendant. She expressed not wanting to have to see him and was very fearful." Pet. App. 36a. While Ms. VanderBent testified that she had made "some progress" with J.B., J.B. clearly articulated "fear that she would not be able to" testify in front of Rose. Pet. App. 37a, 44a. Physical symptoms of J.B.'s fear included being shaky, nervous, and having stomach aches. Pet. App. 44a. In Ms. VanderBent's professional opinion, she "fear[ed] that being face to face could be triggering which would cause [J.B.] to have again some traumatic experiences; numbing, shutting down, not being able to speak even." Pet. App. 37a. Ms. VanderBent further opined that "if [J.B.] can see him it would be-could be traumatic for her." Pet. App. 38a.

The prosecutor discussed J.B. testifying with the aid of a screen "where people can see [J.B.] but she can't see people." Pet. App. 38a. Ms. VanderBent

agreed that use of such a screen "could sufficiently safeguard her emotional and psychological well being." Pet. App. 39a. She further agreed that J.B. "would be psychologically and emotionally unable to testify if we didn't have some sort of protection that goes beyond re-configurating the courtroom." Pet. App. 39a. The problem with J.B. in particular, Ms. VanderBent testified, is that:

> [J.B.] expressed this fear of being in front of face to face to the defendant. Some, you know, it varies based on the child. However, because she has verbally expressed that this is very scary for her, shows me that this is something we need to try to prevent her from being so fearful. Because if she's too fearful and she becomes-her stress arousal happens, she's going to have a very difficult time expressing, verbalizing and accessing her memories.

Pet. App. 45a.

At the conclusion of Ms. VanderBent's testimony, the trial judge asked when J.B. last expressed fear of testifying in front of Rose. Pet. App. 49a. Ms. VanderBent replied, "Yesterday at 3:00." Pet. App. 49a. The judge then asked her whether "there's a potential for [J.B.] to regress in her therapy," to which Ms. VanderBent replied, "I feel that she could, yes." Pet. App. 49a.

The judge then stated his findings and ruling on the record:

> I'm satisfied that based on the testimony of the therapist there's a high likelihood that it could cause [J.B.] to regress in her therapy, have psychological damage to her in recovering from these allegations, and . . . restoring her to a condition that would allow her to function as a normal human being in society, based on her request, the therapist has also indicated that this could cause her to possibly not testify, to become-I'm not sure of all the terms that she said she used in respect to how this could affect her. The child's expression that she's very afraid, didn't want to see the defendant. I think that's much different

> than an adult or an older teenager, an older child. This was expressed as recently as yesterday so that I'm satisfied that the criteria of the statute under 600.2163A have been met and it's necessary to permit this to protect the welfare of this child.
>
> So, I don't think that that's intrusive of the right to confrontation because the defendant and his counsel will be present during her testimony, they'll be able to see her, and be able to cross examine, as will the jury. So, the motion is granted.

Pet. App. 52a–53a.

J.B. testified from behind the small, one-way witness screen attached to the witness stand.[4]

[4] Rose only included one dark, black and white copy of a still photograph taken at the side of the witness stand. Pet. App. 54a. At the request of the Michigan Supreme Court, the parties produced several color photographs and videos of the courtroom and the witness screen from pertinent viewpoints after the trial. The picture above is a still from the courtroom and screen after trial from the video, which shows the slightly shaded but otherwise unobstructed view of the witness box from the defense table. Exhibit 1, MVI_5894.thm at 00:08.

Rose and his counsel could see J.B. through the screen from the defense table.[5]

The entire jury had an unimpeded view of J.B.[6]

[5] Exhibit 2, a video during the second day of trial depicting four simultaneous camera viewpoints, shows a lightly shaded view of J.B. testifying from behind the witness screen from camera 2's viewpoint. Exhibit 2, rose-1.wmv at 01:22:45.

[6] This picture is a still from the video of the courtroom and screen taken after the trial that depicts the completely unobstructed view of the witness box from the jury box. Exhibit 1, MVI_5898.thm at 00:17.

And the trial court could see J.B. from the bench.[7]

C. Procedural history.

Rose was convicted of four counts of criminal sexual conduct and two counts of distributing obscene matter to a child. On appeal, the Michigan Court of Appeals held that use of the one-way screen during J.B.'s testimony did not violate Rose's rights to confrontation or due process.

Following this Court's decision in *Maryland* v. *Craig*, 497 U.S. 836 (1990), the Michigan Court of Appeals adopted the *Craig* test in *People* v. *Burton*, 556 N.W.2d 201 (Mich. App. 1996). Pet. App. 9a. That is, first, the trial court must determine if the in-court procedure "is necessary to further an important state interest." *Ibid.* Second, "[t]he trial court must . . . hear evidence and determine whether the use of the procedure is necessary to protect the witness." *Ibid.* The procedure is necessary to protect the witness if the trial court finds "the witness would be traumatized by

[7] This picture is a third still picture from the video of the courtroom and screen after trial that provides a partial view of the witness box from the bench. Exhibit 1, MVI_5899.thm at 00:15.

the presence of the defendant and that the emotional distress would be more than *de minimis*." Pet. App. 9a–10a.

Here, the Michigan Court of Appeals concluded that both parts of the *Burton*/*Craig* test were satisfied. The trial court "found that the use of the witness screen was necessary to protect JB when it invoked Mich. Comp. Laws § 600.2163a and stated that it was 'necessary to permit this to protect the welfare of this child.'" Pet. App. 10a. The trial court also made particularized findings that J.B. would suffer psychological trauma and would likely regress in her therapy if she testified in front of Rose. *Ibid*. "These findings were sufficient to warrant limiting Rose's ability to confront JB face to face." *Ibid*. Moreover, "the use of the witness screen preserved the other elements of the confrontation right and, therefore, adequately ensured the reliability of the truth-seeking process." *Ibid*. Hence, use of the witness screen did not violate Rose's right to confront the witness against him.

The Michigan Court of Appeals then addressed whether use of the screen infringed Rose's rights to due process and the presumption of innocence. The court relied on the factors this Court outlined in *Holbrook* v. *Flynn*, 475 U.S. 650 (1986). One factor "is whether the practice gives rise primarily to prejudicial inference or whether it is possible for the jury to make a wider range of inferences from the use of the procedure." Pet. App. 10a. "If a particular procedure is not inherently prejudicial, the defendant bears the burden of showing that the procedure actually prejudiced the trial." Pet. App. 10a–11a. "However, when the procedure is

inherently prejudicial, it will not be upheld if the procedure was not necessary to further an essential state interest." Pet. App. 11a.

The court held that the witness screen did not violate Rose's right to due process or the presumption of innocence. The court stated that "a screen is generally not the type of device that brands a defendant with the mark of guilt, such as wearing prison garb or being shackled and gagged." Pet. App. 11a. Further, "a reasonable juror might . . . conclude that the witness fears to look upon the defendant because the witness is not testifying truthfully," among other reasons. Pet. App. 11a–12a. Hence, use of the screen was not inherently prejudicial. Even if it were, the Michigan Court of Appeals noted that this Court "has already held that the state has a compelling interest in protecting child witnesses from the trauma of testifying when the trauma would be the result of the defendant's presence and would impair the child's ability to testify." Pet. App. 12a. The court further concluded that the availability of alternatives to the screen, such as video recording or testimony via closed-circuit television, involve the same concerns. The defendant maintains the burden to prove prejudice, which he did not do here. Pet. App. 12a–13a. Consequently, the Michigan Court of Appeals upheld the use of the witness screen and affirmed Rose's convictions.

Rose applied for leave to appeal in the Michigan Supreme Court, which initially granted the application. Pet. App. 19a. The court asked the parties to address "whether the use of a screen to shield a child complainant from the defendant during testimony violates the Confrontation Clause or prejudices the

defendant because it impinges on the presumption of innocence." *Ibid*. Following oral argument, the court vacated the earlier grant "because [the court was] no longer persuaded that the questions presented should be reviewed," over a dissent by Justice Marilyn Kelly. Pet. App. 20a.

REASONS FOR DENYING THE PETITION

I. There is no split among the states on the federal constitutional right to confrontation.

The petition casts a line without a hook. Rose claims that this Court should grant the petition "to resolve a conflict among the States as to whether a child witness may testify from behind a barrier that prevents her from seeing the accused." Pet. 7. But there is no conflict among the states' interpretation or application of the Sixth Amendment right to confrontation.

The states are bound to follow *Maryland* v. *Craig*'s holding that there is no Confrontation Clause violation when a state interest to protect the physical or psychological well-being of a child witness exists. And states follow *Craig*. The cases Rose cites are not in conflict with *Craig* or with any other precedent from this Court. Further, to the extent that states vary on whether a child witness must testify eyeball-to-eyeball to the defendant, it is because of textual variations in the state constitutions and statutes and how that language is interpreted by state courts under state law. Some states require literal face-to-face confrontation under state law. But that does not create a conflict for this Court to resolve. See *Arizona* v. *Evans*, 514 U.S. 1, 8 (1995) ("[S]tate courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution."). Moreover, no case from this Court has overruled *Craig*.

A. The petition cites no cases establishing a conflict between the states or Circuits regarding the Confrontation Clause and *Craig*.

No conflict exists on a federal constitutional question. Rose merely announces that "[t]he decision of the Michigan courts in this case deepens a conflict among the states—a conflict that only this Court can resolve—concerning the constitutionality of [using a witness screen]." Pet. 8. Rose further asserts that "Michigan joins a small number of states, that, given a showing of necessity, allow [the use of a witness screen]." Pet. 8. But Rose's cited cases do not conflict with *Craig* on the confrontation right. Thus, there is no conflict supporting granting a writ of certiorari.

This Court in *Maryland* v. *Craig* held that use of closed-circuit, one-way television did not violate a defendant's right to confrontation when the state makes a necessary showing of harm to the child witness's welfare. *Craig*, 497 U.S. at 860. The Court emphasized that it had never held that "the Confrontation Clause guarantees criminal defendants the *absolute* right to a face-to-face meeting with witnesses against them at trial." *Ibid*. Rather, the Court's cases had generally established that "the Confrontation Clause reflects a *preference* for face-to-face confrontation at trial . . . that must occasionally give way to considerations of public policy and the necessities of the case . . . ." *Id*. at 849 (citations and internal quotation marks omitted). The Court held that if the state demonstrates necessity, a special procedure is permissible:

> [I]f the State makes an adequate showing of necessity, the state interest in protecting child witnesses from the trauma of testifying in a

> child abuse case is sufficiently important to justify the use of a special procedure that permits a child witness in such cases to testify at trial against a defendant in the absence of face-to-face confrontation with the defendant.

Id. at 855.

Moreover, in *Craig*, the Court held that *not* employing a special procedure in these circumstances does not serve the truth-finding function:

> Indeed, where face-to-face confrontation causes significant emotional distress in a child witness, there is evidence that such confrontation would in fact *disserve* the Confrontation Clause's truth-seeking goal.

497 U.S. at 857. Thus, the Court held that a defendant's right to confrontation is not violated when the state makes a case-specific showing of necessity for the protection of a child witness. And the state's demonstrated necessity preserves the purpose of confrontation by ensuring the reliability of the evidence through the adversarial process and in a functionally equivalent manner to in-person testimony. *Id*. at 851, 857. In *Craig*, the Court concluded there was no violation:

> Because there is no dispute that the child witnesses in this case testified under oath, were subject to full cross-examination, and were able to be observed by the judge, jury, and defendant as they testified, we conclude that, to the extent that a proper finding of necessity has been made, the admission of such testimony would be consonant with the Confrontation Clause.

Id. at 857. The Court's holding in *Craig* was consistent with language used in *Coy* v. *Iowa*, where the Court left open the possibility that there could be exceptions to the confrontation right based on "individualized findings" of a need to protect the

witness. *Coy* v. *Iowa*, 487 U.S. 1012, 1021 (1988) (involving an impermissible statutory presumption of harm).

The Court's holding in *Craig* is, of course, the final say on the issue. And even Rose recognizes that the Court's holding in *Craig* was consistent with language used in *Coy*. Pet. 7. Rose does not dispute that *Craig* is controlling, but rather challenges *Craig*'s "vitality." Pet. 13. Michigan, like other states, has had no qualms applying *Craig*'s test. See *People* v. *Burton*, 556 N.W.2d 201 (Mich. App. 1996); *People* v. *Pesquera*, 625 N.W.2d 407 (Mich. App. 2001); *People* v. *Buie*, 775 N.W.2d 817 (Mich. App. 2009).

But the disparate group of cases Rose cites in support of his alleged conflict is not inconsistent with the holding or considerations expressed in *Craig*. These cases fall into four categories: (1) failure to establish the required harm before using alternate protective measures, (2) outright blockage of the defendant's view, (3) not involving child witness testimony in the first instance, or (4) circumstances that did not violate the Confrontation Clause at all.

Because the cases fall into these four categories, they are distinguishable from the situation here and do not impose a conflict among the states on the federal confrontation right. *Sparkman* v. *Commonwealth*, 250 S.W.3d 667, 669–70 (Ky. 2008) (trial court failed to satisfy state statute's "compelling need" standard, no effort was made to determine the effect of testifying on the children, and the prosecutor stood between children and defendant, blocking defendant's

observations); *Star* v. *Commonwealth*, 313 S.W.3d 30, 39 (Ky. 2010) (involving no child testimony under *Craig* standard, but, instead, a courtroom layout that caused the witnesses to not see the defendant and the defendant not to see the witnesses); *Richardson* v. *State*, 581 S.E.2d 528, 530 (Ga. 2003) (involving the defendant's inability to see the witness, no child testimony under *Craig* standard, and no determination of a confrontation violation); *People* v. *Lofton*, 740 N.E.2d 782, 794 (Ill. 2000) (barricade provided defendant no view of witness "whatsoever," and, although not relying on a statute providing alternate means of presenting testimony, trial court made no findings required under the statute); *Fuson* v. *Tilton*, No. 06-cv-0424, 2007 WL 2701201, at *12–14 (S.D. Cal. Sept. 10, 2007) (no unreasonable application of clearly established Supreme Court precedent where child used hand to shield view of defendant; judge, jury, and defendant could view witness; and evidence in the record supported concerns about child's well-being and ability to testify).

In fact, the most analogous cases Rose cites in his petition actually support the constitutionality of a witness screen. See *State* v. *Thomas* (*Thomas II*), 442 N.W.2d 10 (Wis.), cert. denied, 493 U.S. 867 (1989) (screen in video deposition used in conjunction with television screen that allowed defendant to see witness upheld on reconsideration after *Coy* and pre-*Craig*); *State* v. *Vogelsberg*, 724 N.W.2d 649 (Wis. App. 2006), cert. denied, 550 U.S. 936 (2007) (allowing use of witness screen, although the opinion does not indicate the nature of the screen or its effect on defendant's ability to see the witness).

Moreover, any variations in state law alone are neither a basis for this Court to exercise jurisdiction, nor a consideration for granting certiorari. Under 28 U.S.C. § 1257(a), there must be a federal question. Rose acknowledges that there are variations between state statutes and that "most states have statutes authorizing special arrangements for the testimony of children on a showing of necessity." Pet. 9–10. Further, Rose points out that "[s]ome state constitutions have been held to bar obstruction." Pet. 10 (citing *Commonwealth* v. *Amirault*, 677 N.E.2d 652 (Mass. 1997)). These differences do not carry Rose across the threshold for granting certiorari.

B. Craig remains good law after *Crawford* v. *Washington* and *United States* v. *Gonzalez-Lopez.*

Impliedly conceding that his chances in this case rely entirely on the Court overruling *Craig*, Rose contends that it is necessary to determine *Craig*'s continuing validity after *Crawford* v. *Washington*, 541 U.S. 36 (2004), and *United States* v. *Gonzalez-Lopez*, 548 U.S. 140 (2006). Rose claims that these cases cast "grave" doubt on *Craig*. Pet. 17. But despite Rose's belief that these two cases, which address issues different from those presented here, was the death knell for *Craig*, he cites *zero* cases sharing his prognosis, in the eight and six years since those cases were decided, respectively. In fact, one court actually quoted Rose's own counsel's 2004 opinion that *Crawford* had *no* effect on *Craig*:

> Finally, we note that one commentator has opined that, in *Crawford*'s wake, "the rule of [*Craig*] is presumably preserved" because "*Crawford* addresses the question of *when* confrontation is required; *Craig* addresses the question of *what* procedures confrontation requires. The

> two cases can coexist peacefully, and nothing in *Crawford* suggests that *Craig* is placed in doubt."

Vogelsberg, 724 N.W.2d at 654 (quoting Richard D. Friedman, Adjusting to Crawford: High Court Decision Restores Confrontation Clause Protection, 19 Crim. Just. 4, 8 (2004)).

Rose's counsel had it right the first time. *Crawford* involved a different constitutional issue entirely: the state's use at trial of an out-of-court statement by the victim, where the defendant had no opportunity for cross-examination because the victim was unavailable at trial. The Court in *Crawford* held that this scenario violated the Confrontation Clause because when testimonial statements are involved, the necessary indicia of reliability sufficient to satisfy what the Constitution demands is confrontation through cross-examination. *Crawford*, 541 U.S. at 68–69. The Court's decision in *Crawford* did not overrule or limit *Craig*. Indeed, the majority opinion never even mentions *Craig*.

Rose is left to argue that *Craig* was overruled by implication—something the Court is not prone to do:

> We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent. We reaffirm that "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."

Agostini v. *Felton*, 521 U.S. 203, 237 (1997) (quoting *Rodriguez de Quijas* v. *Shearson/American Express*, *Inc.*, 490 U.S. 477, 484 (1989)).

Moreover, the waters of the lower federal and state courts on whether *Crawford* overruled *Craig* are calm. The issue is not even percolating in the lower courts. Rose cites no case from any jurisdiction that has abrogated *Craig*'s reasoning in light of *Crawford*—not from the states or from the Circuits. In fact, the states have recently noted the *lack* of any conflict. See, e.g., *State* v. *Jackson*, 717 S.E.2d 35, 39–40 (N.C. App. 2011); *State* v. *Stock*, 256 P.3d 899, 904 (Mont. 2011). And this Court has at least four times declined to review some form of Rose's argument. See *Stock* v. *Montana*, 132 S. Ct. 850 (2011); *Pack* v. *United States*, 552 U.S. 1313 (2008); *Vogelsberg* v. *Wisconsin*, 550 U.S. 936 (2007); *Blanchette* v. *Kansas*, 549 U.S. 1229 (2007).

With nothing in the holding of *Crawford* for his position that *Crawford* overruled *Craig* and faced only with an overruled-by-implication argument, Rose turns to another case for the same purpose. But *Gonzalez-Lopez* had no effect on *Craig* either.

Gonzalez-Lopez involved "[w]hether a district court's denial of a criminal defendant's qualified right to be represented by counsel of choice requires automatic reversal of his conviction." 548 U.S. 140 (2006) (question presented in petition). The government argued that there is no complete violation unless the defendant can demonstrate deficiency and prejudice or that counsel of choice would have pursued a strategy that had a reasonable probability of producing a different outcome. *Id*. at 144–45. The Court reasoned that the Sixth Amendment's right to counsel of choice "commands, not that a trial be fair, but that a particular guarantee of fairness be

provided - - to wit, that the accused be defended by the counsel he believes to be best." *Id.* at 146. The Court held "that the error violated respondent's Sixth Amendment right to counsel of choice and that this violation is not subject to harmless-error analysis." *Id.* at 152. *Gonzalez-Lopez* represents a different issue and contains nothing more than a passing reference to using care to not overly abstract the Sixth Amendment right.[8] *Crawford* and *Gonzalez-Lopez* did not overrule, limit, or call into question the vitality of *Craig*.

C. The Michigan Court of Appeals correctly applied *Craig* in light of the trial court's finding of necessity to protect J.B.'s welfare.

As a constitutional question under the Confrontation Clause, the answer is clear: there is no violation when a child rape victim testifies behind a one-way screen *after* the trial court has determined that the People have shown a necessity based on the state's interest in protecting a child victim's welfare.

Prior to taking proofs at trial, the prosecutor called the child's therapist to testify to why a screen was needed. Pet. App. 32a. The therapist testified to the manifestations of what appeared to be "trauma related symptoms," which included: "nightmares, bed wetting, difficulty concentrating, spacing out, zoning out at the school but also at home, [and] frequent anger outbursts." Pet. App. 35a. The child victim "indicated that she would be very afraid to come and testify in court and have to see the defendant. She expressed not wanting to have to see him and was

[8] In the majority opinion, Justice Scalia quoted from his dissent in *Craig*, and cautioned against applying reasoning that "abstracts from the right to its purposes, and then eliminates the right" when analyzing the Sixth Amendment. *Gonzalez-Lopez*, 548 U.S. at 145 (quoting *Craig*, 497 U.S. at 862 (Scalia, J., dissenting)).

very afraid." Pet. App. 36a. Regarding whether the child expressed concern over whether she would be able to testify face-to-face, the child "expressed fear that she would not be able to." Pet. App. 37a. The child had expressed her fears about testifying in front of the defendant: "She's very fearful, very shaky, talks about being very nervous, stomach aches." Pet. App. 44a. As to the trauma face-to-face testimony could cause the child, the therapist testified, "I fear that being face to face could be triggering which would cause her to have again some traumatic experiences; numbing, shutting down, not being able to speak even." Pet. App. 37a. Moreover, from a truth-seeking standpoint, this fear could cause the child "to have a very difficult time expressing, verbalizing and accessing her memories" and the goal was to prevent "any symptoms that would cause her not to be able to testify." Pet. App. 45a–46a. The therapist expressed a concern that the child victim would regress in her therapy. Pet. App. 49a.

Based on this testimony, the trial court made a specific finding of necessity as *Craig* requires:

> So, based on the testimony of her therapist who has 12 or 13 years of experience and has been providing therapy for this witness, who is 8 years old, not a teenager, and looking at the nature of these offenses, there's four counts of criminal sexual conduct involving penetration, and the disparity of age and also the other counts in respect to criminal sexual conduct in the second degree, and accosting for immoral purposes, distribution of obscene materials, I'm satisfied that based on the testimony of the therapist there's a high likelihood that it could cause her to regress in her therapy, have psychological damage to her in recovering from these allegations, and regressing in her therapy and psychologically to restoring her to a condition that would allow her to function as a normal human being in society, based on her request, the function as a normal human being in society, based on her

> request, the therapist has also indicated that this could cause her to possibly not testify, to become – I'm not sure of all the terms that she said she used in respect to how this could affect her. The child's expression that she's very afraid, didn't want to see the Defendant. I think that's much different than an adult or older teenager, an older child. This was expressed as recently as yesterday so I'm satisfied that the criteria of the stature under 600.2163a have been met and it's necessary to permit this to protect the welfare of this child.
>
> So, I don't think that that's intrusive of the right to confrontation because the Defendant and his counsel will be present during her testimony, they'll be able to see her, and be able to cross examine her, as will the jury. So, the motion is granted.

Pet. App. 52a–53a. In sum, this case is the paradigm of why it is necessary to protect child victims, and how it can be done without offending a defendant's right to confrontation.

The Michigan Court of Appeals also determined that the trial court's findings were sufficient under *Craig*:

> In making its findings, the trial court also clearly referred to the fact that JB had expressed fear of Rose and that, given her age, the nature of the offenses, and her therapist's testimony, there was "a high likelihood" that testifying face to face with Rose would cause her to "regress in her therapy, have psychological damage" and could cause her "to possibly not testify . . . ." These findings were sufficient to warrant limiting Rose's ability to confront JB face to face. See *Craig*, 497 U.S. at 856–857. In addition, aside from JB's inability to see Rose, the use of the witness screen preserved the other elements of the confrontation right and, therefore, adequately ensured the reliability of the truth-seeking process. *Id.* at 851–852. Consequently, the trial court's decision to permit JB to testify with the witness screen did not violate Rose's right to confront the witnesses against him.

Pet. App. 10a.

In this case, everyone could see the witness. Rose could see the child witness through the small, one-way screen, and so could his counsel, who could move without limitations. No impediment to effective cross-examination existed. The jury could see the child witness unimpeded from the jury box. The trial court could see the child witness from the bench. The truth-seeking function was served. And the Court's holding in *Craig* is the beginning and the end of the inquiry. Where the trial court, as here, made the requisite finding of necessity under *Craig*, the use of a one-way screen did not violate Rose' right to confrontation.

II. There is no mature split on whether the use of a protective accommodation deprives a defendant of the presumption of innocence; any variation in the protective measure is fact-bound; and the one-way screen used here was constitutional.

Rose raises a second argument that has not permeated the federal or state courts. The use of witness screens has not created a wave of defendants claiming violations of the presumption of innocence, nor courts struggling to navigate a constitutional path.

A. There is no mature split.

Although protective measures are used throughout the country, Rose cites and relies on a single case that has a different fact pattern. The petition does not present any split, much less a mature one, on whether the use of a witness screen to protect a child witness's welfare violates the presumption of innocence.

Rose's claimed conflict is based entirely on *State* v. *Parker*, 757 N.W.2d 7 (Neb. 2008). In *Parker*, the Nebraska Supreme Court held that the use of a two-way witness barrier (essentially an office partition) was prejudicial and violative of the presumption of innocence. *Id.* at 11–12, 16–19. Significant to the Nebraska Supreme Court's analysis was how it referred to the barrier, i.e., "a large opaque screen jutt[ing] curiously into the room" and that had the effect of forcing the defendant "to look onto a large panel instead of his accuser . . . ." *Id.* at 17–18. The court under those facts concluded that "[i]t would have been a matter of common sense for the jurors to conclude that the court had placed the screen for [the victim's] protection because the court believed her accusations were true" and "even discounting such an explicit connection, there were no other innocuous inferences the jury would have been likely to derive from the screen." *Id.* at 17.

Wholly aside from the significant difference between a two-way and a one-way screen, the Michigan Court of Appeals recognized correctly that the use of a witness screen could result in any number of non-prejudicial inferences: (1) the witness refuses to look at the defendant because of untruthfulness; (2) to calm the witness's general anxiety; and (3) as a matter of human experience, a child accusing a defendant of harm, likely fears the defendant. These inferences in no way answer the fundamental questions of guilt: whether a rape occurred and whether the defendant was in fact the perpetrator. Pet. App. 11a–12a.

The Michigan Court of Appeals correctly rejected the conclusion "that the use of a screen—no matter what its size or composition may be and no matter how it

was employed at trial—must in every case be presumed to prejudice the defendant." Pet. App. 12a. The Michigan Court of Appeals noted that there was "no evidence in the record that discloses the screen's appearance—we do not know its size, shape, color, or the nature of the materials used."[9] Pet. App. 12a. Likewise, Rose had "not presented any evidence that the use of the screen occasioned more prejudice than an alternative method—indeed Rose's trial counsel did not even suggest use of another method . . . ." Pet. App. 13a. Against this backdrop, the Michigan Court of Appeals concluded that Rose had failed to show prejudice. Pet. App. 12a–13a. But even if the screen had been inherently prejudicial, the Michigan Court of Appeals recognized that a screen could be used if "necessary to further an essential state interest," like trauma to a child witness. Pet. App. 12a (citing *Holbrook* v. *Flynn*, 475 U.S. 560, 568–69 (1986); *Craig*, 497 U.S. at 855–57).

There is no case that has recognized a presumption-of-innocence violation on similar facts, i.e., using a relatively small, one-way screen. There is no mature split.

[9] On January 28, 2011, counsel for the People and Rose entered a stipulation of supplemental exhibits at the request of the Michigan Supreme Court. Exhibit 1, created January 19, 2011, shows the courtroom and the screen used. Exhibit 2, a copy of the courtroom DVD from the second day of trial on April 23, 2008, shows J.B. testifying using the screen. Exhibit 3 is a photo of the Universal Vulnerable Witness Screen taken from the website: http://courtscreens.com/desktop.htm. Exhibit 4 is a photo of the screen's specifications from: http://courtscreens.com/ specifications.htm.

B. The use of a witness screen to protect a child victim's welfare does not violate a defendant's right to the presumption of innocence because it is not inherently prejudicial, and even if it was, its use survives scrutiny because of the state's interest to protect witnesses and encourage testimony.

It is indisputable that the Constitution protects the right to a fair trial and that the presumption of innocence is subsumed in that right. *Estelle* v. *Williams*, 425 U.S. 501, 503 (1976). To implement the presumption, guilt must be established by the evidence beyond a reasonable doubt, and not by factors that erode the fairness of the proceedings. *Id*. Although actions that affect fundamental rights are subject to close scrutiny, the defendant's interests can be balanced against an "essential state policy." *Estelle*, at 504–05.

This Court has taken a pragmatic approach to analyzing presumption-of-innocence claims. The Court has recognized "that jurors are quite aware that the defendant appearing before them did not arrive there by choice or happenstance, [the Court has] never tried, and could never hope, to eliminate from trial procedures every reminder that the State has chosen to marshal its resources against a defendant to punish him for allegedly criminal conduct." *Holbrook*, 475 U.S. at 567. And measuring a potential violation of the presumption of innocence is, therefore, not conducive to mechanical precision. Rather, courts "look at the scene presented to jurors and determine whether what they saw was so inherently prejudicial as to pose an unacceptable threat to defendant's right to a fair trial; if the challenged practice is not found inherently prejudicial and if the defendant fails to show actual prejudice, the inquiry is over." *Id*. at 572. It is a reality of the inquiry that "[c]ourts

must do the best they can to evaluate the likely effects of a particular procedure, based on reason, principle, and common human experience." *Estelle*, 425 U.S. at 504.

Even if prejudicial to the defendant, not all procedures are constitutionally infirm. See *Estelle*, 425 U.S. at 505 (holding that no "essential state policy" was served by having defendant tried in prison garb). Applying this pragmatic approach has led the Court to conclude that some actions under certain circumstances violate the right to a fair trial and the presumption of innocence, while others do not.[10]

In this way, although the Court did not reach the presumption issue in *Coy*, Justice Blackmun's dissent applied this pragmatic approach and is consistent with reason and common human experience and is persuasive on how jurors view the use of a witness screen:

> Unlike clothing the defendant in prison garb, *Estelle* v. *Williams*, *supra*, or having the defendant shackled and gagged, *Illinois* v. *Allen*, 397 U.S. 337, 344, 90 S. Ct. 1057, 1061, 25 L.Ed.2d 353 (1970), using the screening device did not "brand [appellant] . . . 'with an unmistakable mark of guilt.'" See *Holbrook* v. *Flynn*, 475 U.S. at 571, 106 S. Ct., at 1347, quoting *Estelle* v. *Williams*, 425 U.S., at 518, 96 S.

[10] See, e.g., *Deck* v. *Missouri*, 544 U.S. 622, 633 (2005) ("conclud[ing] that courts cannot routinely place defendants in shackles or other physical restraints visible to the jury during the penalty phase of a capital proceeding" but recognizing that trial courts have the discretion to take into account special circumstances); *Illinois* v. *Allen*, 397 U.S. 337, 345–46 (1970) (trial court acted within discretion when removing defendant from courtroom where defendant's conduct "was clearly of such an extreme and aggravated nature as to justify either his removal from the courtroom or his total physical restraint"); *Holbrook*, 475 U.S. at 570–71 (no "unacceptable risk of prejudice in the spectacle of four [uniformed and armed] officers quietly sitting in the first row of a courtroom's spectator section"); and *Estelle*, 425 U.S. at 505, 512-13 ("compelling an accused to wear jail clothing furthers no essential state policy" and "although the State cannot, consistently with the Fourteenth Amendment, compel an accused to stand trial before a jury while dressed in identifiable prison clothes, the failure to make an objection to the court . . . is sufficient to negate the presence of compulsion necessary to establish a constitutional violation").

> Ct., at 1699 (Brennan, J., dissenting). A screen is not the sort of trapping that generally is associated with those who have been convicted. It is therefore unlikely that the use of the screen had a subconscious effect on the jury's attitude toward appellant. See 475 U.S., at 570, 106 S. Ct., at 1346.

Coy, 487 U.S. at 1034–35 (Blackmun, J., dissenting). The Michigan Court of Appeals here correctly relied on Justice Blackmun's dissent. Pet. App. 11a. Rose presents no compelling reason for this Court to exercise its discretionary review.

CONCLUSION

The petition for a writ of certiorari should be denied.

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